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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1913

AAACON AUTO TRANSPORT, INC.,
Petitioner,

v.

JUDITH A. MILLER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Aaacon Auto Transport, Inc., petitions this Court for a Writ of Certiorari, to review the order of the United States Court of Appeals for the Fifth Circuit affirming a decision of the United States District Court for the Southern District of Florida.

OPINIONS BELOW

In the case below respondent brought an action in the state courts of Florida. Petitioner had it removed to the United States District Court for the Southern District of Florida. The decision of the District Court, after a non-jury trial, was to award respondent $2,550.00 plus interest, $250.00 sanctions, costs, and $25,000.00 in attorneys' fees on the basis of Section 8 of the Interstate Commerce Act, 49 U.S. Code Sec. 8. A three-judge panel of the U.S. Court of Appeals for the 5th Circuit affirmed

the award *per curiam.* A petition for reconsideration en banc was denied.

JURISDICTION

The Order of the Court of Appeals denying petitioner's timely petition for reconsideration was entered on April 23, 1980. Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 2101(c).

QUESTIONS PRESENTED

1. Is Section 8 of the Interstate Commerce Act applicable to motor carriers?

2. Are the attorneys' fees authorized by 49 U.S.C. Section 8 "necessary to the enforcement" of a claim for cargo damages under 49 U.S.C. 20(11)?

3. Does 49 U.S.C. 20(11) preclude the award of attorneys' fees, even those otherwise awardable under the equity powers of a Court?

4. Should public policy bar the imposition of attorneys' fees as an undue burden on interstate commerce?

STATUTES AND FEDERAL RULES INVOLVED

United States Code, Title 49, Section 8

Sec. 8. Liability in damages to persons injured by violation of law

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or

attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

United States Code, Title 49, Section 20(11)

Sec. 20, par. (11). Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.

Any common carrier, railroad or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property

may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates

dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further,* That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further,* That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

United States Code, Title 49, Section 20(12)

Sec. 20, par. (12). Recovery by initial or delivering carrier from connecting carrier.

The common carrier, railroad, or transportation company issuing such receipt or bill of lading, or delivering such property

so received and transported, shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action at law brought by the owners of such property.

United States Code, Title 49, Section 319

Sec. 319. Application of Section 20(11) and (12) of this title to common carriers by motor vehicle.

The provisions of Section 20(11) and (12) of this title together with such other provisions of Chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.

Code of Federal Regulations, Title 49, Section 1005.2(d)

Sec. 1005.2 Filing of claims.

(d) *Claims filed for uncertain amounts.* Whenever a claim is presented against a proper carrier for an uncertain amount, such as "$100 more or less," the carrier against whom such claim is filed shall determine the condition of the baggage or shipment involved at the time of delivery by it, if it was delivered, and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section.

STATEMENT OF THE CASE

Petitioner Aaacon Auto Transport, Inc. ("Aaacon") is an interstate motor carrier of automobiles licensed by the Interstate Commerce Commission. Its tariff permits operation by means of "casual drivers"—private travelers who are not employees of petitioner and happen to be traveling to the location the automobiles are being shipped to.

Aaacon and respondent, Mrs. Miller, contracted for the transport of her car from California to Florida. The car was damaged in Florida during transport.

Petitioner sent Mrs. Miller claims forms, although not required by law to do so. Mrs. Miller did not send in the forms, although she testified she had seen them (opinion of the District Court, p. 2). Mr. Miller at first testified he and his wife hadn't received any claims forms from petitioner. However, the claims forms were found to be in the possession of Mrs. Miller's attorney in the courtroom (See Appendix 1 for pp. 244-246, 274 of the transcript of the trial in the District Court). Mrs. Miller, through her attorney, did send petitioner a letter demanding "payment for the car" but not claiming any amount. Petitioner subsequently received a complaint which contained a demand for "more than $2,500". Neither by letter nor by the complaint did Mrs. Miller ever send Aaacon a claim in writing for a specific amount. Under 49 C.F.R. 1005.2(d), *Claims filed for uncertain amounts,* interstate carriers such as Aaacon are directed, "Whenever a claim is presented . . . for an uncertain amount, such as '$100 more or less,' . . . not (to) voluntarily pay a claim . . . unless and until a formal claim in writing for a specific and determinable amount of money shall have been filed."

Miller brought suit for the value of the car and $100,000 punitive damages. The trial court awarded the value of the car ($2,500.00), no punitive damages, but approximately $25,000 in attorneys' fees under authority of 49 U.S. Code Sec. 8. The 5th Circuit affirmed *per curiam.*

This is, to petitioner's knowledge, *the first Federal case in which attorneys' fees have been awarded against an interstate carrier in a cause of action for damage to goods transported under* 49 U.S. Code Sec. 20(11).

REASONS FOR GRANTING WRIT

I

NO AUTHORITY EXISTS FOR AWARD OF ATTORNEYS' FEES AGAINST A MOTOR CARRIER UNDER 49 U.S. CODE SEC. 8.

For the first time, and contrary to prior Supreme Court decisions, a motor carrier has been held liable for attorneys' fees under 49 U.S.C. Sec. 8. The decision of the trial court held Aaacon liable for attorneys' fees on the authority of 49 U.S.C. Sec. 8, which it found applicable through 49 U.S.C. Sec. 319, and the court's equitable powers discussed *infra.*

In *T.I.M.E. Inc. v. U.S.,* 359 U.S. 464 (1958), decided sixteen years after the adoption of Sec. 319, the Supreme Court found Sec. 8 not applicable to motor carriers. The Supreme Court based its decision on the rejection by congress of an amendment to apply Sec. 8 to motor carriers:

> "The very provisions of Part I [applicable to railroads], and their counterparts in Part III [applicable to water carriers], which give a right of action to shippers against carriers for damages incurred by carrier violations of the Act and provide the mechanics for the enforcement of that right are conspicuously absent in the Motor Carrier Act [Part II]." Id. at 470.
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> ***
>
> "In the hearings which preceded the passage of legislation in 1949 adding to the Motor Carrier Act a statute of limitations . . . proposals were made to amend the statute by adding to it provisions similar to those found in Sec. 8 . . .

> The suggested changes were not adopted. And in 1957 the Commission again recommended amendment of the Motor Carrier Act to provide a remedy of the statute to persons injured thereby and once again the measure failed of adoption." Id. at 471.

The trial court's application of Sec. 8 to defendant, a licensed interstate motor carrier, is in direct conflict with the Supreme Court decision in *T.I.M.E.*

II

ATTORNEYS' FEES ARE NOT "NECESSARY TO THE ENFORCEMENT" OF 49 U.S.C. SEC. 20(11).

Secs. 20(11) and (12) do not authorize attorneys' fees but rather only damages for the "full actual loss, damage or injury to . . . property." Claims by shippers against interstate carriers for attorneys' fees in cases involving damage to shipped goods have been consistently rejected for all causes of action arising under 49 U.S.C. Sec. 20(11) until the instant case. In the landmark case of *Atlantic Coastlines v. Riverside Mills,* 219 U.S. 207 (1911), the Supreme Court of the United States held that attorneys' fees were not awardable under Secs. 20(11) and (12). In that case, the carrier, in direct violation of the Interstate Commerce Act, had inserted a non-liability provision in its bill of lading. The shipper's goods were damaged. Nevertheless, the Supreme Court struck the attorneys' fees awarded by the lower court.

The trial court below also contended (p. 9 of its decision) that Sec. 8, the sole statute authorizing attorneys' fees, was applicable by virtue of 49 U.S. Code Sec. 319. It noted that Sec. 8:

> ". . . would not be applicable to defendant but for 49 U.S.C. Sec. 319, which provides that the provisions of 49 U.S.C. Sec. 20(11) and (12), as well as any appropriate provisions of Chapter 1 *necessary for their enforcement* are made applicable to motor carriers." (emphasis added).

However, attorneys' fees are not "necessary for the enforcement" of 49 U.S.C. 20(11).

In support of the view that Congress did not intend the "necessary" standard in 49 U.S.C. 319 to include attorneys' fees is the fact that Congress has *repeatedly rejected proposed amendments* to Secs. 20(11) and (12) which would have provided directly for attorneys' fees for claims brought under those provisions. See *94th Cong. Sess.* Bills HR 13353 and HR 12491.

The award of attorneys' fees is an extra-ordinary occurrence under the American system. The basic American rule is that, absent congressional authorization, damages in litigation are not to include an award of attorneys' fees. *Alyeska Pipeline Service Co. v. Wilderness Society, Inc.,* 421 U.S. 240 (1975).

Clearly, congress did not intend that the minimal standard of "necessary to their enforcement" of 49 U.S. 319 should include the extra-ordinary relief that attorneys' fees represent.

Inasmuch as 49 U.S.C. 20(11) has been enforced countless times, but attorneys' fees have *never* been awarded,* it is incorrect to assert that attorneys' fees are "necessary" to the enforcement of 49 U.S.C. 20(11). One may argue that attorneys' fees are appropriate, reasonable, or even desirable to the enforcement of 49 U.S.C. 20(11). This, however, is a *legislative* decision. Petitioner asserts that the minimal standard commonly understood in the word "necessary" cannot include the unusual and extra-ordinary relief that attorneys' fees represent.

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*R. Sigmon, *Miller's Law of Freight Loss and Damage Claims* (Wm. Brown Co., 9174); see also the Notes of Decision to 49 U.S.C. 319 and 20(11) and (12) wherein there is no category for attorneys' fees.

III

EQUITABLE AWARD OF ATTORNEYS' FEES IS PRECLUDED BY CONGRESSIONAL ENACTMENT.

The trial court also found equitable power to award attorneys' fees. However, the Supreme Court has previously held that no attorneys' fees can be equitably awarded where, as here, the applicable statute, 49 U.S.C. Secs. 20(11) and (12), sets forth the actual measure of damages. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967).

The law is well settled that comprehensive Congressional statutes, such as Secs. 20(11) and (12), which delineate the measure of damages (actual loss to cargo transported), preclude equitable imposition of attorneys' fees or other remedies. In *Fleischmann,* the Supreme Court held that attorneys' fees are not awardable even for the *willful* violations of a statute therein, the Lanham Act, since that statute—like the Interstate Commerce Act herein—by its detailed terms, provided only for compensatory damages:

> "The recognized exceptions to the general rule of American jurisprudence prohibiting attorneys' fees [to successful parties] were not, however, developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies. Trademark actions under the Lanham Act do occur in such a setting. For, in the Lanham Act, Congress meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed. *It provided* not only for injunctive relief, but *also for compensatory recovery* measured by the profits that accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled in appropriate circumstances" (emphasis added). Id. at 719.

The Supreme Court held that even provisions for "costs" in the Lanham Act did not permit atto .ys' fees:

> "Moreover, since with the exception of the docket fee provided by 28 U.S.C. Sec. 1923(a), *the statutory definition of the term 'costs' does not include attorneys' fees,* acceptance of petitioners' argument would require us to ascribe to Congress a purpose to vary the meaning of the term without either statutory language or legislative history to support the unusual construction" (emphasis added). Id. at 720.

The Supreme Court went on to note that the Lanham Act (like the Interstate Commerce Act applicable to the facts herein) was never amended by congress to permit attorneys' fees, despite attempts to do so:

> "Several attempts to introduce such a provision to allow attorneys' fees into the Lanham Act have failed of enactment. *We, therefore, must conclude that Congress intended* Sec. 35 of the Lanham Act *to mark the boundaries of the power to award monetary relief in cases arising* under the Act" (emphasis supplied). Id. at 721.

Similarly, in *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240 (1974), the Supreme Court rejected an award of attorneys' fees under a court's equitable powers. It said that Congress alone has the ultimate power to authorize attorneys' fees.

The Supreme Court, in *Alyeska,* recognized that there was an exception to the rule against attorneys' fees where the losing party "has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Id. at 258.* *But even as to this exception,* the Supreme Court held that Congress had overriding power:

> "These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, *unless forbidden by Congress."* Id. at 263.

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*The trial court found the evidence of Aaacon's conduct *prior* to the time Mrs. Miller filed suit in this case was not indicative of "gross or willful misconduct" (p. 8 of trial court decision).

"Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are *matters for Congress to determine.*" Id. at 263.

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"Congress itself presumably has the power and judgment to pick and choose among its statutes and allow *attorneys' fees under some, but not others.* But it would be difficult indeed for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former" (emphasis supplied). Id. at 264.

In the instant case, Congress *has* exercised its power to declare an exclusive measure of damages available in cases arising under 49 U.S.C. Sec. 20(11). Thus, in *Missouri Pacific v. Rouw Co.*, 258 F.2d 445 (5th Cir., 1968), this Court recognized that the Interstate Commerce Act provided the exclusive measure of damage:

"for the full actual loss, damage or injury to such property caused by" [the carrier]

and that such damages are to be compensatory only:

"The shipments involved here being interstate, the liability of the carrier and the measure of damages are determined by *the Interstate Commerce Act* and the decisions of the Courts of the United States construing it. *Georgia, Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U.S. 190 (1916).

"The Supreme Court, in *Illinois Central R. Co. v. Crail,* 281 U.S. 57 (1930), demonstrated clearly that the market value rule should be applied in such a way as to dovetail with the rule *permitting recovery of compensatory damages only*" (emphasis added). Id. at 446, 447.

Accordingly, by the Congressional enactment of 49 U.S.C. Secs. 20(11) and (12), equitable awards by courts of attorneys'

fees are precluded.*

By comparison, the cases cited by the trial court to uphold the award of attorneys' fees under equitable powers do not arise under detailed statutory provisions on damages contained in the Interstate Commerce Act. On the contrary, *Hall v. Cole,* 412 U.S. 1 (1973), cited by the trial court as authority, dealt with a Federal statute, the Labor-Management Reporting and Disclosure Act of 1959, which *called for attorneys' fees* in several sections, and, in the section in question, authorized the courts to grant "such relief (including injunctions) as may be necessary." This statutory opening for the full equitable powers of the Court is in stark contrast with the meticulously detailed statute governing the matter sub judice under the Interstate Commerce Act. Yet the Supreme Court, in *Hall v. Cole,* noted that under a court's equitable power, no attorneys' fees could be awarded if Congress had prescribed a measure of damages by statute:

> "This does not end our inquiry, however, for even where 'fee-shifting' would be appropriate *as a matter of equity, Congress has the power to circumscribe such relief"* (emphasis added). Id. at 9.

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*There can be no doubt that Congress, in enacting the Interstate Commerce Act, set forth the exclusive, pre-emptive cause of action for all claims against carriers for damage to goods shipped in interstate commerce for "damage or injury to such property caused by" the carrier. The United States Supreme Court, in the landmark case of *Adams Express Co. v. Croninger,* 226 U.S. 491 (1913), held that all such actions against an interstate carrier comprise a single statutory cause of action, regardless of theory of recovery and regardless of whether the complaint sounds in tort or contract. In *Adams Express, supra,* the United States Supreme Court discussed the Interstate Commerce Act measure of damages as follows:

> "That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulations with reference to it." Id. at 505, 506.

The Supreme Court, in *Hall,* went on to find specifically that in the legislation considered therein, Sec. 102 of LMDRA, Congress did not set forth a measure of damages, but merely left the remedy to the courts' discretion "to grant such relief" (including injunctions) as may be appropriate. This contrasts with the statutory basis of the instant case.

Two other cases relied on by the trial court, *Sprague v. Ticonic Natl. Bank,* 307 U.S. 161 (1939) and *Vaughn v. Atkinson,* 369 U.S. 527 (1962), were themselves unequivocally distinguished by the Supreme Court in *Fleischmann, supra,* p. 718, as narrow, peculiar exceptions to the American rule. *Vaughn* involved admiralty law, and *Sprague* involved a common fund created and financed by the plaintiff for the benefit of others.

The final case cited by the trial court as authority, *McEnteggard v. Cataldo,* 451 F.2d 1109 (1st Cir., 1971), is a *sui generis* case involving a due process claim by a dismissed teacher who was awarded attorneys' fees even though he lost on the merits. It is simply not in point.

Clearly, then, there is no authority for the imposition of attorneys' fees on an equitable basis, in the face of the Congressional enactment providing for the sole measure of damage.

As set forth above, since 49 U.S.C. Secs. 20(11) and (12) do not provide for attorneys' fees, and since Sec. 8 is not applicable to Aaacon as a motor carrier, there is no statutory basis to award attorneys' fees.

Accord: *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.,* 417 U.S. 116, 126 (1974) (reversing award of fees under Miller Act where there was no explicit statutory provision).

IV

AS A MATTER OF PUBLIC POLICY, ATTORNEYS' FEES SHOULD NOT BURDEN INTERSTATE COMMERCE.

Assuming, *arguendo:*

1) that *T.I.M.E. Inc. v. U.S.*, 359 U.S. 464 (1958), did not bar application of Sec. 8 to motor carriers such as petitioner herein;

2) that the necessity of attorneys' fees to 49 U.S.C. 20(11) were an open question; and

3) that 49 U.S.C. 20(11) did not preclude attorneys' fees,

the delicate yet vital nature of interstate commerce indicates that, as a matter of public policy, interstate carriers dealing with claims of shippers should not be faced with the extraordinary burden attorneys' fees represent.

The Constitution of the United States has always recognized the vital nature of interstate commerce.

Interstate carriers are not all giant railroads, with revenues in hundreds of millions from which to finance law offices in every state. Although it does business throughout the United States, Aaacon has total gross annual revenues of some $3,000,000, and its profits are a small fraction of that sum. The profits, for a company such as petitioner, are strongly affected by an adverse judgment, as herein, of some $30,000. Aaacon is not unique among interstate carriers. In its specialized field, the driveaway business, it is actualy one of the larger organizations. There are many other smaller, regional operations. Likewise, in the trucking field there are many entities licensed as "interstate carriers" whose actual operations consist of a few employees and a few trucks.

All interstate carriers, as Aaacon herein, must defend claims outside their state of domicile. The retention of out-of-state counsel is an expense which cannot be avoided by an interstate carrier. Every counsel for an interstate carrier understands the delicate financial determination in deciding whether to engage in the always-expensive defense of a claim, no matter how frivolous that claim may be.

Under the precedent-shattering decision appealed herein, every common carrier, no matter how small, must deal with the intimidating possibility that any claim, no matter how small, could explode into an award of entirely unknown magnitude. In short, the tremendous incentive to litigation attorneys' fees represent is at the same time an undue burden on interstate carriers, who are already once-disadvantaged by the distance from which they must so often litigate.

In the case at bar, the trial judge found "defendant acted in bad faith in failing to promptly investigate and pay plaintiff's claim" (p. 10, District Court decision).

Plaintiff was required by Federal regulation to submit a written notice of claim. 49 C.F.R. 1005.2(d). The trial judge found "that the written notice requirement was met by the receipt by defendant of plaintiff's demand letter and the copy of the complaint as well as the correspondence and extensive negotiations which occurred between the parties after defendant was *orally notified* of the claim" (emphasis added) (p. 5 of District Court decision).

At the same time, Aaacon was bound by the Interstate Commerce Commission, 49 C.F.R. 1005.2(d), not to "voluntarily pay a claim . . . unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed. Surely the assertion of this defense with an apparently valid basis should not be grounds for a finding of bad faith. Otherwise, this would constitute an unconscionable burden on litigation, and a chill on Constitutionally protected rights.

The Second Circuit Court of Appeals has recently reaffirmed its holding in ***Brown Debenture Holders' Committee*** *v.*

DASA Corp., 560 F.2d 1078, 1088 (2d Cir., 1977), that for a finding of bad faith, there must be "clear evidence" that claims or defenses were asserted "entirely without color *and* made for reasons of harassment or delay or for other improper purposes." *Nemeroff et ano. v. Abelson et al.*, __F.2d__(2d Cir., 1980).

> "A claim is colorable, for the purposes of the bad faith exception [to the American Rule of no attorneys' fees], when it has some legal and factual support, considered in the light of the reasonable beliefs of the individual making the claim." Id. at 1841.

Aaacon's defense of failure of Mrs. Miller to file a claim within nine months was based upon valid facts, and was asserted in good faith. It was cognizable at law: *William Danzer & Co. v. Gulf & S.I.R.Co.*, 268 U.S. 633 (1924); *B.A. Walterman Co. v. Penn. R.R.*, 295 F.2d 627 (6th Cir., 1967); *American Synthetic Rubber Co. v. Louisville & Nashville R.R. Co.*, 422 F.2d 462, 468 (6th Cir., 1970); and mandated by Commission regulation, 49 C.F.R. 1005.2(d).

Accordingly, to punish an interstate carrier for abiding by Federal regulations is to expose interstate commerce to a potentially devastating wave of litigation and to chill the assertion of valid defenses, and is thus overwhelmingly against the public interest.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit affirming the decision of the United States District Court for the Southern District of Florida.

Respectfully submitted,

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APPENDIX 1

Pages 244, 245, 246 and 274 of Trial Transcript, U.S. District Court, Southern District of Florida

(244)

J.A. Miller—Direct

Q. At any time.

A. I asked him this afternoon. I said "Did we get a claim report? I don't remember." You were talking about a claim report—

Q. Not a claim report, a claim form sent out by Aaacon's claims department.

A. I said "I don't remember getting one." He said "I have one in my file."

Q. If he has it in your file, it must have been sent to you.

A. Maybe it was. I don't remember getting one is what I'm telling you. If I did, believe me, I would tell you.

Q. I don't believe the claims department would have sent this to Mr. O'Connor directly.

A. No.

MR. O'CONNOR: I don't know whether he is right or wrong in that assumption, Your Honor.

THE WITNESS: I don't know when—

MR. COHN: Objection, Your Honor.

THE WITNESS: —If it came, when it came.

MR. COHN: May I see the claims form from Mr. O'Connor's file, if he has it?

MR. O'CONNOR: As a matter of fact, Your Honor, in view of the testimony the Court already heard, I was going to make a request that I be permitted to testify to refute the testimony that Mr. Zola has given concerning what I did and what I said, and at that time, I will be happy to disclose the entire contents of my file.

THE COURT: I think he has a right to have it now and we will worry about that when we get to it.

MR. O'CONNOR: Which claims forms?

MR. COHN: Claim form sent out by Aaacon's claims department with a short letter.

MR. O'CONNOR: Tell me the letter and I will give it to you.

MR. COHN: The letter and this claims form. You will probably have the originals in your file.

THE WITNESS: May I see them, please?

MR. O'CONNOR: I think what the Judge wants to know is, did you ever get that letter and that claim form. Whether I did or I didn't, I guess the question is directed to this witness. If I'm going to be interrogated, I'd like to be put under oath.

THE COURT: We will get around to that in a moment. Right now, it is the direct examination of Mrs. Miller.

THE WITNESS: I remember seeing this letter. I don't remember receiving it.

BY MR. COHN:

Q. Do you remember receiving the letter?

A. I remember seeing this, yes, after I saw it.

Q. When did you receive that?

A. I have no idea. The only way I remember seeing this is when it was showed to me—

Q. Did you hand it over to Mr. O'Connor?

A. —yesterday. This? I don't remember.

MR. COHN: Your Honor, I would ask Mr. O'Connor to produce the originals of those if he has them in his file.

THE COURT: I think that's proper.

MR. O'CONNOR: I'm sorry, I didn't hear what the Court said.

THE COURT: I think it is proper.

THE WITNESS: I do remember this letter, though.

MR. O'CONNOR: Talking about this?

MR. COHN: Yes.

MR. O'CONNOR: You see anything else you want?

MR. COHN: Was there a letter?

(274)

to take up the weekend on lines of questioning that—and I don't mean to finally blow the whistle when you're at the lectern. It's just that I think we ought to get back on track.

This case is going to be resolved by the evidence before me and the law on a lot of points that have to be resolved.

MR. ZOLA: I will change the topic and be as brief as possible.

BY MR. ZOLA:

Q. Mr. O'Connor, you have produced from your file the claim form of our company and you state that you had no communication with us, with Aaacon, until you received my letter and then Mr. Lefkowitz asked you for an extension of time. Could that claim form have come from any source or was it not in fact tendered to you by Mrs. Miller originally?

A. I assume that claim form was with the standard letter referring to "Dear Customer." I assume that's where I got it. I'm confident I never received it from Mr. Jerome or Mr. Lefkowitz, or anywhere else. *I assume I got it with the photographs and police report and rest of the material from Mr. and Mrs. Miller.*

Q. Mr. O'Connor, isn't it true that someone

APPENDIX 2

Findings of Fact and Conclusions of Law, February 21, 1978, U.S. District Court, Southern District of Florida

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JUDITH A. MILLER

vs.

AAACON AUTO TRANSPORT, INC.

Case No. FL 74-196-Civ-NCR

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this action arising under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §20(11) plaintiff Judith A. Miller seeks recovery from defendant for the loss of her 1971 Camaro. After a lengthy procedural history[1] the case was tried before this court which now enters the following findings of fact and conclusions of law.

FACTS

In April of 1974 Ms. Miller shipped her 1971 Chevrolet Camaro with defendant AAACON from San Francisco to Fort Lauderdale under a standard bill of lading. No extra tariffs were paid. When accepted for transport by defendant's driver in San Francisco the car was in good condition, having only a few minor dents and scratches. About 6:00 A.M. on April 13, 1974, while being transported by AAACON's driver, the car overturned and ran into a canal near Ruskin, Florida. The accident was promptly reported by Ms. Miller to Mr. Jerome in defen-

1. See: *Miller v. AAACon,* 434 F. Supp. 40 (S.D. Fla. 1977); *Miller v. AAACon,* 545 F.2d 1019 (5th Cir. 1977).

dant's New York office. Jerome requested an accident report, pictures of the car, and a statement from Miller's insurance company regarding her coverage. Ms. Miller was assured by Jerome that she would be reimbursed with no problem. However, over the next month Ms. Miller and her husband repeatedly called Jerome about their claim but had great difficulty reaching him. During this period, plaintiff was never contacted by defendant. Failing to receive satisfaction from defendant, the Millers contacted an attorney. He contacted Jerome in mid-May and was told that AAACON would not conduct an investigation until it received a statement from plaintiff's insurance company regarding her coverage. Ms. Miller had been told by her insurance company that the information requested by AAACON had been sent. In fact, her company had sent a letter to Jerome on April 19th stating that her insurance had been cancelled. Ms. Miller therefore felt that there was nothing more she could do. On the advice of her attorney, who felt that AAACON was trying to avoid payment, Ms. Miller did not send in the pictures or the accident report.

Ms. Miller remembers seeing a written claim form but cannot remember when it was received. The form was never sent in to AAACON; nor does plaintiff remember it being requested. On May 21, 1974 plaintiff's attorney sent a demand letter to defendant with a copy of a complaint which he threatened to file in one week unless defendant satisfied plaintiff's claim.

By June 1, 1977 defendant under the direction of Ralph Zola had completed its investigation of the accident. The car was never delivered to plaintiff and is in a junk yard somewhere in Ruskin. Ms. Miller also lost approximately $350 to $500 worth of personal property which was destroyed when the car turned over in the canal. The market value of a 1971 Camaro hard top with air conditioning in the condition in which it arrived was nothing. Had it arrived in good condition, the car's market value would have been $2,500.

There is no competent evidence in the record that the accident was unavoidable. The only evidence presented by defen-

dant on the issue is the hearsay statement of Ralph Zola, and the police report, also hearsay (eventually received by stipulation). The court must reject entirely the claim of the driver that he swerved to avoid an unidentified animal and thereby lost control. The statement is self-serving and exculpatory; similarly lacking in credence is driver's assertion he was traveling at the speed limit of 55 m.p.h. The skid marks compel a finding that the car must have been travelling at a speed in excess of the limit.

CONCLUSIONS OF LAW

Under 49 U.S.C. §20(11) and 49 U.S.C. §319 liability is imposed on a motor carrier for the full actual loss or damage to property transported by the carrier without regard to the issue of negligence on the part of the carrier. In order to make out a prima facie case, the shipper need only prove that the goods were delivered in good condition, that they arrived in a damaged condition, and the amount of damage. The burden then shifts to the carrier to prove that it was free from negligence and that the damage was due to one of the excepted causes relieving the carrier of liability. *Missouri Pacific R.R. v. Elmore & Stahl,* 377 U.S. 134, 139 (1964).

NOTICE TO CARRIER

Defendant asserts that plaintiff is barred from recovery by her failure to file a written notice of claim as required by Section 2(b) of the Uniform Straight Bill of Lading, incorporated by reference in defendant's bill of lading. Although this issue was initially raised in defendant's answer by a denial of plaintiff's allegations, it was omitted in defendant's pretrial stipulation.

It is well settled that the written claim requirement is valid and enforceable and that oral notification and/or actual knowledge of the claim is insufficient to impose liability upon a

carrier for damage to shipments. *Georgia, Fla. & Ala. Ry. v. Blish Milling Co.*, 241 U.S. 190 (1915); *East Texas Motor Freight Lines v. U.S.*, 239 F.2d 417 (5th Cir. 1956). The purpose of the written claim requirement is not to avoid the payment of just claims, but to facilitate the prompt investigation of claims and insure equality of treatment among shippers. *Georgia, Fla. & Ala. Ry. v. Blish Milling Co.*, 241 U.S. at 197.

In the *Blish Milling* case the Supreme Court adopted a liberal view of what constitutes a written claim:

> "Granting that the stipulation is applicable and valid, it does not require documents in a particular form. It is addressed to a practical exigency and it is to be construed in a practical way." *Id.* at 198.

Thus the court found that a series of telegrams contained an adequate statement of the claim to satisfy the requirement.

The Fifth Circuit has held that the requirement is satisfied if the written instruments supply "sufficient information upon which a prompt and complete investigation may be based." *Thompson v. James G. McCarrick Co.*, 205 F.2d 897 (5th Cir. 1953). And the notice is sufficient if a carrier cannot draw any inference from it other than that a claim for damages was contemplated, even if the writing does not contain a formal demand for damages. *Delaware, L. & W. Ry. v. U.S.*, 123 F. Supp. 791 (S.D. N.Y. 1954).

In the case sub judice, the court finds that the written notice requirement was met by the receipt by defendant of plaintiff's demand letter and the copy of the complaint as well as the correspondence and extensive negotiations which occurred between the parties after defendant was orally notified of the claim. The court finds this case distinguishable from *East Texas Motor Freight Lines v. U.S.*, 239 F.2d 417 (5th Cir. 1956), relied on by defendant. In that case there were no extensive dealings between the parties and the shipment was not totally destroyed.

Even if the written claim requirement were not satisfied in this case the court would be constrained to conclude that defendant is estopped from asserting this defense by its conduct in this case. It appears to the court from the evidence that defendant's initial concern in this case was the extent of plaintiff's insurance coverage and that Ms. Miller was therefore led to believe that there was nothing she could do to aid defendant in investigating her claim. Although AAACon sent plaintiff its standard claim form, the cover letter does not refer to the fact that the accompanying form must be filled out, and in view of defendant's conduct and representations, only served to reinforce plaintiff's belief that she need take no further action.

The court recognizes that the Supreme Court has held that the written claim requirement may not be waived by the carrier. *Georgia, Fla. & Ala. Ry. v. Blish Milling Co.*, 241 U.S. 191, 197 (1916). However that decision and the case law following it must be considered in the light of the policy behind it which seeks to prevent discrimination by carriers among shippers. In addition, the court recognizes that carriers also have a duty, vis-a-vis their relationship to shippers to safeguard shippers' interests. *Hubbard v. Allied Van Lines, Inc.*, 540 F.2d 1224, 1230 (4th Cir. 1976). The mechanical application of the rule regarding waiver of the written claim requirement outside a commercial context of protecting competing shippers to the facts in this case would not serve the purposes for which the rule was created. Instead of being a shield to shippers it would work an injustice by placing a sword in the hands of common carriers to injure consumers—such as plaintiff—who are not armed with the knowledge of legal technicalities but rely in good faith on assurances that their claims will be taken care of.

Having concluded that plaintiff has satisfied the prerequisites to filing suit, the court now considers the merits of her claim and finds that plaintiff has made out a prima facie case of liability. Defendant therefore has the burden of proving that the damage to plaintiff's car was caused by the pleaded defense of an act of God or other exception. *Missouri Pacific R.R. v. Elmore & Stahl*, supra.

An Act of God can be defined as

> "a sudden, and unexpected manifestation of the forces of nature which man cannot resist; . . . an accident produced by physical causes which are irresistible, and a natural necessity, which could not have been occassioned by the intervention of man." 1 Am. Jur. 2d, Act of God §1 (1962).

Defendant asserts that the animal jumping in front of the car was an act of God because there was no way for the driver to have avoided it. Although in appropriate circumstances such an occurrence might be an "Act of God", the court finds that defendant's conclusions in this case beg the question. Defendant has offered no credible evidence to show that the appearance of the animal was a sudden unexpected occurrence under the circumstances and that the accident was unavoidable. Therefore, the court finds that defendant has failed to meet its burden on the defense of Act of God. Accordingly, plaintiff is entitled to recover from defendant for her actual damages, loss or injury caused to her property. *Federated Dept. Stores, Inc. v. Brinke,* 316 F. Supp. 1402 (S.D. Fla. 1970), aff'd 450 F.2d 1223 (5th Cir. 1971). Ordinarily this will be determined by computing the difference between the market value of the property in the condition in which it should have arrived, and the market value in the damaged condition in which it did arrive. *Gulf, C. & S. F. Ry. Co. v. Texas Packing Co.,* 244 U.S. 31, 37 (1917). Applying this test to the facts in this case the court finds that plaintiff is entitled to the sum of $2,500 actual damages for the loss of her car. Additionally, she lost $300 worth of personal property but is limited by the tariff to $50.

PUNITIVE DAMAGES

Plaintiff has also claimed punitive damages for defendant's unjust refusal to pay her claim, relying primarily on the authority of *Hubbard v. Allied Van Lines, Inc.,* 540 F.2d 1224 (4th Cir. 1976) and 49 U.S.C. §8.

The court would agree with the reasoning set forth in the *Hubbard* case that the Carmack Amendment does not bar an award of punitive damages, and that in appropriate cases such damages may be awarded against a motor carrier under 49 U.S.C. §8 when the carrier has violated the provisions of Ch. 1 of Title 49 made applicable to it by 49 U.S.C.§319. In addition, punitive damages might be recoverable under federal common law, where a carrier has injured a plaintiff by acting with "actual malice or reckless or wanton indifference to the rights of the plaintiff." *International Brotherhood of Boilermakers, etc. v. Braswell,* 388 F.2d 193, 199 (5th Cir. 1968). However, the facts in the case sub judice do not support an award of punitive damages. Although there is much evidence in the record concerning AAACON's past history of misconduct in seeking to avoid payment of just claims, the court finds that the evidence of AAACON's conduct *prior* to the time Ms. Miller filed suit in this case is not indicative of gross and wilful misconduct.

The court has also considered the evidence of AAACON's conduct subsequent to the filing of suit, which plaintiff claims supports a finding of punitive damages.[2] The court finds that defendant's tactics ir this court of gruding retreat, rock by rock, fence row by fence row—usually with another defense not pleaded before—combined with their failure to inform this court or the Fifth Circuit Court of Appeals of pertinent decisions concerning the validity of defendant's arbitration clause have unduly prolonged this litigation. The court must observe that defendant has established a pattern of this type of behavior. As the Interstate Commerce Commission noted:

> AAACon and Auto Trip have, throughout the course of these proceedings, repeatedly filed petitions seeking leave to admit additional evidence and argument, and petitions for reconsideration of the Commission's orders denying the relief sought . . . [T]hese numerous petitions have unnecessarily lengthened the record in this proceeding. . . . 124 M.C.C. 493, 507 (1976).

2. The court considers this evidence under Rule 15(b) F.R.C.P.

See also *Aluminum Products Distributors v. AAACon Auto Transport,* 549 F.2d 1381, 1385 (10th Cir. 1977) (concluding paragraphs of opinion). This conduct, repeated in the case sub judice, is reprehensible.

Defense counsel may have felt that they were merely acting in the interests of their client, and were not technically evading any ethical duties.[3] However, counsel has an obligation as an officer of the court to inform the court of significant developments in the law—even if not controlling precedents required to be disclosed by D. Rule 7-106(A)(1)which would affect the court's decision in a case and might avoid protracted and piecemeal litigation such as occurred here. Only because the other decisions were not controlling on this court does the court conclude defendant's conduct of the litigation does not support an award of punitive damages.

ATTORNEY'S FEES

The claim for attorney's fees poses a different question. Plaintiff seeks recovery pursuant to 49 U.S.C. §8 which provides an award of attorney's fees if a carrier "shall do, cause to be done, or permit to be done any act, matter or thing in this chapter [chapter 1] prohibited or declared to be unlawful."

This section would not be applicable to defendant but for 49 U.S.C. §319, which provides that the provisions of 49 U.S.C. §20(11) and (12), as well as any appropriate provisions of Chapter 1 necessary for their enforcement are made applicable to motor carriers.

This court has already declared, as have two circuit courts, that defendant's arbitration clause is an unlawful attempt to limit its liability in violation of 49 U.S.C. §20(11). See: *Aluminum Products Distributors, Inc. v. AAACon Auto Transport, Inc.,* 549 F.2d 1381 (10th Cir. 1977); *AAACon Auto*

3. It is difficult to avoid observing that defendant is a closely-held family corporation represented in court by the family law firm. The identity of interests apparently blurs counsel's perception of their duty as officers of the court.

Transport, Inc. v. State Far Mutual Auto Ins., 537 F.2d 648 (2d Cir. 1976); *Miller v. AAACon Auto Transport, Inc.*, 434 F. Supp. 40 (S.D. Fla. 1977). The court further finds that the use of the arbitration clause in this case caused plaintiff to incur unnecessary expense and attorney's fees by prolonging the litigation. Therefore the court finds that defendant has violated the provisions of 49 U.S.C. §20(11) to the injury of plaintiff and plaintiff is entitled to an award of reasonable attorney's fees under 49 U.S.C. §8.

In addition, the court finds that an award of attorney's fees would be appropriate pursuant to the court's equitable power to award fees where appropriate in the interests of justice. *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166 (1939). This exception to the general American rule of attorney's fees was recognized in *Alyeska Pipeline Service Co. v. Wilderness Society, Inc.*, 421 U.S. 240, (1975) where the losing party has acted in "bad faith, wantonly or for oppressive reasons." 421 U.S. at 258.

In the case subjudice defendant acted in bad faith in failing to promptly investigate and pay plaintiff's claim, and forced her to resort to protracted litigation in order to obtain relief. Therefore, plaintiff is entitled to attorney's fees. See *Vaughn v. Atkinson*, 369 U.S. 527 (1962); *McEnteggard v. Cataldo*, 451 F.2d 1109 (1st Cir. 1971).

Based on the foregoing findings of fact and conclusions of law as well as the court's prior findings of fact entered in this case, the court finds that plaintiff is entitled to recover her actual damages for the loss of her car in the amount of $2,500, plus interest from the date of the accident, plus the loss of personal property in the amount (limited by the tariff) of $50, plus a reasonable attorney's fee to be determined after a hearing (see *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), plus costs. In addition, plaintiff is entitled to the $250 fine assessed against defendant by this court on June 15, 1976 for its failure to comply with the pretrial procedures of this court.

JUDGMENT shall be entered accordingly.
DONE AND ORDERED this 21st day of February, 1978.

s/ Norman C. Roettger, Jr.
United States District Judge

cc—Morgan, Carratt & O'Connor
cc—Zola & Zola
cc—Barry R. Shapiro

APPENDIX 3

Final Judgment, U.S. District Court, Southern District of Florida

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. FL 74-196-Civ-NCR

JUDITH A. MILLER,

vs.

AAACON AUTO TRANSPORT

FINAL JUDGMENT

THIS CAUSE having come on for trial before the court, the Hon. Norman C. Roettger, Jr., District Judge, presiding, and the issues having been duly tried and a decision duly rendered, it is

ORDERED AND ADJUDGED that the plaintiff Judith A. miller, recover of the defendant AAACon Auto Transport, Inc. the sum of $2,550 plus interest from the date of the accident, plus $250 as sanctions, plus costs and attorney's fees to be hereinafter determined.

DONE AND ORDERED this 21st day of February, 1978.

s/ Norman C. Roettger Jr.
UNITED STATES DISTRICT JUDGE

cc—Morgan, Carratt & O'Connor
Zola & Zola
Barry Shapiro, Esq.

APPENDIX 4

Judgment on Attorneys' Fees, U.S. District Court, Southern District of Florida

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. FL-74-196-CIV-NCR

JUDITH A. MILLER

Plaintiff,

Vs.

AAACON AUTO TRANSPORT, INC.,

Defendant.

ORDER

THIS CAUSE having come before the court for hearing on March 17, 1978 for a determination of an award of attorneys fees, and the court having considered the factors set forth in *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714 (5th Cir. 1974) and having issued its findings from the bench, it is

ORDERED AND ADJUDGED that plaintiff shall recover the sum of $25,000.00 as reasonable attorneys fees in this cause.

DONE AND ORDERED this 20 day of March 1978.

s/ Norman C. Roettger, Jr.
United States District Court Judge

CC: Morgan, Carratt & O'Connor
Barry Shapiro, Esq.
Zola & Zola

APPENDIX 5
Denial of Appeal by 5th Circuit Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1806

JUDITH A. MILLER,

Plaintiff-Appellee,
Cross-Appellant,

versus

AAACON AUTO TRANSPORT, INC.,

Defendant-Appellant
Cross-Appellee,

Appeals from the United States District Court
for the Southern District of Florida

(MARCH 5, 1980)

Before TJOFLAT, RUBIN, and TATE, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

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1. *See NLRB v. Amalgamated Clothing Workers of America,* 430 F.2d 966 (5th Cir. 1970).

APPENDIX 6

Denial of petition for rehearing by 5th Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

April 23, 1980

Gilbert F. Ganucheau
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

NO. 78-1806—Judith A. Miller
vs. Aaacon Auto Transport, Inc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

/hea,jr.

By s/ H.E. Adams, Jr.
Deputy Clerk

cc: Mr. Ralph Zola
Messrs. Harry G. Carratt
Francis D. O'Conner

Supreme Court, U. S.
FILED
SEP 22 1980
MICHAEL RODAK, JR., CLERK

NUMBER: 79-1913

in the

Supreme Court

of the

United States

October Term, 1979

AAACON AUTO TRANSPORT, INC.,
Petitioner,

vs.

JUDITH A. MILLER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Harry G. Carratt of

MORGAN, CARRATT AND
O'CONNOR, P.A.
500 Adams Building
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NUMBER: 79-1913

in the

Supreme Court

of the

United States

October Term, 1979

AAACON AUTO TRANSPORT, INC.,
Petitioner,

vs.

JUDITH A. MILLER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Petitioner, Aaacon, has set forth a Statement of the Case which Respondent does not believe is sufficient, and she would set forth an additional Statement of the Case.

Petitioner has also included a limited Appendix to its Brief, but the facts in this case also appear from an earlier decision of the Trial Court in *Miller v. Aaacon,* 434 F.Supp. 40 (S.D. Fla. 1977). Respondent filed suit in the State Court in Fort Lauderdale, Florida, on June 17th, 1974, and the case was subsequently removed to the Federal Court by Aaacon on July 3rd, 1974 (Ibid). Subsequently, the District Court granted Aaacon's Motion to stay the case pending arbitration on September 12th, 1974, and thereafter, the Trial Court, on its own Motion, set aside the Stay Order and reinstated the case on April 13th, 1976. Aaacon then appealed the Trial Court's decision to the United States Court of Appeals for the Fifth Circuit, and the Fifth Circuit remanded the case to the lower Court for additional findings of fact on the question of whether the Order should be set aside. *Miller v. Aaacon,* 545 F.2d 1019 (5th Cir. 1977). Further proceedings were had before the Trial Court in accordance with the Fifth Circuit's mandate, and the District Court entered its Memorandum Opinion on June 30th, 1977, which is reported at 434 F.Supp. 40.

While Aaacon was contending in the Trial Court and the Fifth Circuit Court that the arbitration provisions of its tariff should be continued to be applied so as to require Plaintiff to arbitrate in New York City,

the United States Court of Appeals for the Second Circuit held that the arbitration clause which was being used by Aaacon, was unlawful and invalid, and its continued use of said arbitration clause was improper, unlawful and a violation of the Interstate Commerce Act. *Aaacon Auto Transport, Inc. v. State Farm Mutual Automobile Insurance,* 537 F.2d 648 (2nd Cir. 1976).

A similar decision was also entered by the Tenth Circuit Court of Appeals against Aaacon in *Aluminum Products Distributors, Inc. v. Aaacon Auto Transport,* 549 F.2d 1380 (10th Cir. 1977), and despite these adverse decisions against it, Aaacon continued to ask for arbitration in the Southern District of Florida, as is recited in the reported decisions of the Trial Court. (A 4a-13a). After the Trial Court adhered to its decision of August 13th, 1976, setting aside a stay of the case, the cause proceeded to a non-jury trial before the United States District Court for the Southern District of Florida, and the Trial Court entered a Judgment in favor of Respondent for the sum of $2,550.00, plus a $250.00 fine assessed against the Petitioner by a prior Order of the Court, and awarded reasonable attorneys' fees in favor of Respondent.

The Trial Court found that the Petitioner's acts in the Court were reprehensible, unduly prolonged the litigation, and followed a pattern of the type of behavior noted by the Interstate Commerce Commission in the proceedings before it (A 10a-11a).

SUMMARY OF ARGUMENT

Attorneys' fees may be awarded under the decisions of this Court under the inherent power of the Court, where the opposing party has acted in bad faith, not only in the actions which led to the filing of the law suit, but in the conduct of the litigation, and the District Court and the United States Court of Appeals for the Fifth Circuit had ample authority to authorize the allowance of attorneys' fees against Aaacon in this case under the decision of this Court in *Roadway Exp., Inc. v. Piper,* 100 S.Ct. 2455 (1980), and the cases cited therein.

Attorneys' fees may also be awarded against Petitioner as a result of its action in attempting to unlawfully attempt to limit its liability in violation of *49 U.S.C.* Para. 20(11), under the provisions of *49 U.S.C.* Para. 8, as applied to the Petitioner by *49 U.S.C.* Para. 319, which provides that the provisions of *49 U.S.C.* Para. 20(11 & 12), as well as any appropriate provisions of *Chapter 1,* including penalties, necessary for the enforcement are made applicable to motor carriers.

Aaacon's continued unlawful attempt to use an arbitration clause which was clearly invalid under the Act, was such an unlawful attempt to limit its liability as would authorize the imposition of attorneys' fees under the provisions of the above Statutes.

ARGUMENT

In its argument, Petitioner states that the Trial Court may not make an equitable award of attorneys' fees and that the provisions of the Statutes preclude such an equitable award. In its recent decision in *Roadway Exp., Inc. v. Piper,* 100 S.Ct. 2455 (1980), this Court dealt with the question of an award of attorneys' fees where attorneys' fees were not authorized under the Statutes relating to Civil Rights litigation. In that case, the Court stated as follows:

> "Of course, the general rule in federal courts is that a litigant cannot recover his counsel fees. See *Alyeska Pipeline Co. v. Wilderness Society, supra,* 421 U.S., at 257, 95 S.Ct., at 1621. But that rule does not apply when the opposing party has acted in bad faith . . ."
>
> "The bad faith exception for the award of attorneys' fees is not restricted to cases where the action is filed in bad faith. " '(B)ad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation. . . ." 100 S.Ct. 2464.

Consequently, under the above decision of the court, the Trial Court had ample authority to award attorneys' fees against the Petitioner for its bad faith action which resulted in the filing of the suit and its actions in connection with the conduct of the litigation.

In this case, the Trial Court found that attorneys' fees were justified, where a losing party has acted in "bad faith, wantonly, or for oppressive reasons," and the

Trial Court cited the decision of the Supreme Court in *Alyeska Pipeline Co.*, supra, which was cited as authority for the Court's statement in *Roadway Exp., Inc.*, supra.

The extent of the bad faith of the Defendant is shown by reference to the Trial Court's decision in this matter. In its opinion, the Court stated as follows:

> "The court has also considered the evidence of AAACON's conduct subsequent to the filing of suit, which plaintiff claims supports a finding of punitive damages. The court finds that defendant's tactics in this court of gruding retreat, rock by rock, fence row by fence row — usually with another defense not pleaded before — combined with their failure to inform this court or the Fifth Circuit Court of Appeals of pertinent decisions concerning the validity of defendant's arbitration clause have unduly prolonged this litigation. The court must observe that defendant has established a pattern of this type of behavior . . .
>
> See also *Aluminum Products Distributors v. AAACon Auto Transport,* 549 F.2d 1381, 1385 (10th Cir. 1977) (concluding paragraphs of opinion). This conduct, repeated in the case sub judice, is reprehensible.
>
> Defense counsel may have felt that they were merely acting in the interests of their client, and were not technically evading any ethical duties. However, counsel has an obligation as

> an officer of the court to inform the court of significant developments in the law — even if not controlling precedents required to be disclosed by D. Rule 7-106(A)(1) which would affect the court's decision in a case and might avoid protracted and piecemeal litigation such as occurred here. Only because the other decisions were not controlling on this court does the court conclude defendant's conduct of the litigation does not support an award of punitive damages." (A 10a-11a).

In its decision, the Trial Court considered Plaintiff's claim for an award of punitive damages against the Defendant, because of Defendant's bad faith in its conduct of the litigation, and in particular, that the Defendant had failed to inform the Fifth Circuit Court of Appeals of pertinent decisions concerning the validity of Defendant's arbitration clause which Defendant had urged in the Trial Court and on appeal and which resulted in substantial delay in the litigation. (A 10a-11a). This same review of the reprehensible conduct of the Defendant in connection with the litigation was also discussed in the Trial Court's earlier Memorandum Decision in the case, when the Trial Court affirmed its prior Order setting aside a stay of the case and the Trial Court found that the arbitration clause was invalid and that Defendant had improperly used said arbitration clause in the lower Court and in the Fifth Circuit Court of Appeals. See *Miller v. Aaacon,* 434 F.Supp. 40 (S.D. Fla. 1977).

Aaacon's conduct in the case constituted an intentional and unlawful violation of several *provisions of the Interstate Commerce Act.* First, there was a direct

violation of *Section 20(11),* which provides that any limitation with respect to the manner or form with which an action was brought, is declared to be unlawful and void, and this was the holding of the Second Circuit Court of Appeals in *Aaacon Auto Transport, Inc. v. State Farm Mutual Automobile Ins.,* 537 F.2d 648 (2d Cir. 1976), and the Tenth Circuit Court of Appeals in *Aluminum Products Distributors v. AAACon Auto Transport,* 549 F.2d 1381, 1385 (10th Cir. 1977). Aaacon's conduct before the Trial Court was so reprehensible that the District Court and the Fifth Circuit Court of Appeals were not reluctant to authorize the award of attorneys' fees because of Aaacon's bad faith.

In the *State Farm* case, supra, the Second Circuit Court of Appeals discussed the fact that the Chief of the Interstate Commerce Commission, Tariff Section, had rejected the tariff filed by Aaacon which contained the arbitration clause, it being a violation of *Section 20(11),* and such a rejection became the action of the Commission; and consequently, Aaacon's continued use of said tariff was a violation of *Section 317,* so its use since that time has been improper and unlawful and in violation of the Act (P. 655-657). In addition, Aaacon was found to be in violation of said provisions of the Act by the Commission in 1976 (Report of Interstate Commerce Commission dated April 19, 1976, 124 M.C.C. 493-511-4 122-141), and Aaacon was ordered to cease and desist from using said tariff. The Second Circuit Court of Appeals denied certiorari. *Aaacon Auto Transport, Inc. v. ICC,* 553 F.2d 93 (2d Cir. 1977). Aaacon repeatedly failed to call these decisions to the attention of both the District Court and the Fifth

Circuit Court of Appeals, and this was discussed by the Trial Court when it noted that the Defendant is a closely-held family corporation, represented in Court by the family law firm (P. 10a-11a).

The record before the Trial Court and the Court of Appeals was replete with the bad faith conduct of the litigation by the Defendant in this cause. For example, even though Aaacon's tariff had been determined violative of the provisions of the Act, Aaacon filed a suit in the United States District Court, Eastern District of New York, in June, 1976, against the Respondent to compel arbitration in the Eastern District of New York, while, at the same time, it sought to compel arbitration in the United States District Court for the Southern District of Florida in this case. In order to further illustrate the bad faith of Aaacon in this case, it will be seen from a review of the proceedings before the Interstate Commerce Commission that Aaacon contended that the arbitration clause did not legally require arbitration in the City of New York, but as the Second Circuit Court of Appeals pointed out in the *State Farm* case, supra, a person would be led to the conclusion that arbitration must be held in New York City (P. 659). Despite those positions in those two Courts, in this case, the Trial Court, as well as the Fifth Circuit Court of Appeals, were led to believe by Aaacon that the arbitration clause did require arbitration in New York City, and as a result of such position, the Trial Court entered a Stay Order, requiring the parties to arbitrate in New York City.

In addition to the Trial Court's inherent authority to award attorneys' fees because Aaacon had acted in bad faith or for oppressive reasons, attorneys' fees could also be awarded Respondent under *Section 49 U.S.C.A., Para. 8,* because of Aaacon's violation of *49 U.S.C. 20(11), 49 U.S.C. Para. 319,* and *49 U.S.C. Para. 316.* Under *Para. 8 of Title 49,* it is provided that an aggrieved party is entitled to its full amount of damages caused by any violation of the provisions of said Chapter, together with an award of attorneys' fees. *Para. 20(11) of Title 49* makes it unlawful for any carrier to attempt to limit liability, except as is specifically authorized by said section. *Para. 319 of Title 49* expressly applies the provisions of *Title 49, U.S.C. 20(11),* to motor carriers, "together with such other provisions of Chapter 1 of this Title (including penalties) as may be necessary for the enforcement of such provisions . . . to common carriers by motor vehicles with like force and effect . . . ." Aaacon's conduct in this case was an intentional and unlawful violation of the several provisions of the Interstate Commerce Act. First, it was a direct violation of *Para. 20(11),* when it provides that any limitation with respect to the manner or form with which an action was brought, is declared to be unlawful and void, and this was the holding of both the Second and Tenth Circuits in *Aaacon v. State Farm,* supra, and the *Aluminum Products* case, supra. It is a direct violation of the specific provisions of *Para. 49 U.S.C. 317(a),* which provides that the Commission may reject any tariff filed with it and any tariff so used shall be void and its action unlawful. The attorneys' fee provision of *Para. 8, Title 49,* is a penalty provision to compel compliance with

Para. 20(11), Title 49, and other sections of the Act and it is included in Part 3 of the Act by *Para. 319, Title 49,* to enforce compliance with the Act.

In this case, the Defendant has continuously sought to invoke the arbitration clause in its bill of lading in an unlawful and illegal manner so as to require Respondent to arbitrate her claim in the City of New York. When arbitration proceedings were attempted by Respondent as a result of Aaacon's efforts, Aaacon again showed bad faith in connection with those proceedings. (See Trial Court's decision at 434 F.Supp. 40.)

Even though Aaacon was prohibited from continuing the use of the arbitration clause and it had been ordered to cease and desist from using said tariff, it continued to use said arbitration clause in the proceedings in the lower Court or the District Court in this case and in the Fifth Circuit Court of Appeals, all of which action was improper, unlawful and would authorize the award of attorneys' fees under the above Statutes.

Regardless of whether the Trial Court awarded the fees under the specific provisions of the Act or under its inherent power, the attorneys' fees award was proper and justified under the evidence in the case, and Petitioner has failed to show the necessary considerations required under *Rule 17* of the *Supreme Court Rules* for the granting of a Writ of Certiorari. In its decision, the Trial Court found that the use of the arbitration clause in this case caused Respondent to expend unnecessary expense and attorneys' fees by prolonged litigation and Respondent was entitled to an award of reasonable attorneys' fees under *49 U.S.C.*

Para. 8 (A 11a-12a). In addition, the Trial Court found that attorneys' fees were appropriate because Defendant had acted in bad faith, wantonly, or for oppressive reasons (A 12a).

Clearly, under the decision of the Court in *Roadway Exp., Inc.*, supra, the Trial Court was authorized to award attorneys' fees where a party had acted in bad faith, either prior to the commencement of the litigation or in connection with the proceedings before the Court. Since the award of attorneys' fees is clearly authorized by the Court's decision as an inherent power of the Trial Court, where the litigation had been conducted in bad faith by the Defendant, the necessary requirements for the granting of a Petition for Writ of Certiorari under *Rule 17,* are not present; and accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth in this Brief, it is respectfully submitted that Petitioner has failed to show the necessary prerequisites for the granting of a Petition for Writ of Certiorari, as are set forth under *Rule 17* of the *Supreme Court Rules;* and accordingly, the Petition should be denied. In addition, for the reasons set forth in an accompanying Motion for the award of attorneys' fees, it is respectfully requested that the Court will grant Respondent's Motion for an award of attorneys' fees against Petitioner.

Respectfully submitted,

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No. 1913

IN THE
Supreme Court of the United States
October Term, *1979*

AAACON AUTO TRANSPORT, INC.,
Petitioner,

v.

JUDITH A. MILLER,
Respondent.

SUPPLEMENTAL AND REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 22.6 of the Rules of this Court, the instant brief addresses an issue raised, but not answered in *Roadway Express, Inc. v. Piper,* __ U.S. __, 100 S.Ct. 2455 (1980) reported since the filing of the original petition for a writ of certiorari. It raises a matter of first impression with this Court, namely, whether an award of attorneys' fees for alleged obstructive behavior should be limited to the excess attorneys' fees attributable to said behavior; or whether the award should encompass the attorneys' fees for the entire litigation. Petitioner has no objection to respondent filing a further reply thereto should this Court deem it necessary or proper.

Further, the instant brief replies to the brief in opposition of respondent and corrects errors and omissions in the statement of facts by respondent concerning the proceedings below, to avoid leaving this Court with incorrect impressions.

I

THE AWARD OF ATTORNEYS' FEES WRONGLY EXCEEDED BEYOND THE "EXCESS" COSTS DUE TO ALLEGED OBSTRUCTIVE BEHAVIOR.

In the instant case the District Court held Aaacon's behavior concerning its motion for arbitration to be obstructive. Regardless of the correctness of that finding which is refuted herein below, the District Court erred in awarding plaintiff attorneys' fees of $25,000—covering the entire litigation, despite Aaacon's motions to limit the award of fees to the alleged obstructive behavior.

The Supreme Court of the United States in its recent decision in *Roadway Express, Inc. v. Piper,* __ U.S. __, 100 S.Ct. 2455 (1980) has specifically left open the question of whether an award of attorneys' fees, where appropriate, are awardable for the entire litigation, or solely for that portion of the litigation attributable to any vexatious or dilatory conduct. Mr. Justice Blackmun in his concurrence noted:

> "The Court does not explore the specific features of this exception [to the law permitting awards of attorneys' fees]. Most significantly, it does not address the permissibility of applying this new exception toward attorneys' fees beyond those actually attributable to the culpable attorney's vexatious actions (i.e., 'excess costs' under Sec. 1927). Like the Court, I am willing to let this issue be considered in the first instance on the remand." Footnote 2. (Bracketed langauge added.)

Accordingly, the instant case is one of first impression on this issue.

As argued in petitioner's petition for a writ of certiorari, Congress has precluded awards of attorneys' fees

for vexatious conduct in cases arising under the Carmack Amendment, 49 U.S.C. Sec. 11707. However, should attorneys' fees be awardable in such cases, fees *should be limited* to those hours of additional work caused by defendant's allegedly vexatious conduct. As the United States Supreme Court noted in *Roadway Express, Inc. v. Piper,* __ U.S. __, 100 S.Ct. 2455 (1980):

> ". . . because such fees are shielded from direct democratic controls, they must be exercised with restraint and discretion."

In recognition of this limitation, federal courts have uniformly held that attorneys' fees awarded by virtue of such inherent power must be confined to fees incurred for those hours of additional work specifically caused by the opposing counsel's vexatiousness. In *Wright v. Jackson,* 522 F.2d 955, 958 (4th Cir. 1975), this Court held that:

> "An award of obstinacy, though a penalty, should cover only the unnecessary effort occasioned by the obstinacy (Citations omitted) . . . no matter how obdurate defendants may have been, for example, in their refusal of performance, which led, in fact, to a finding of contempt, *this cannot justify an assessment for a previous part of the case in which no obstinacy occurred.* Accordingly, even though some bases for the district court's awards survive our previous disposition, we must remand for a recomputation, limited to an assessment of the extent to which plaintiffs were burdened by defendant's obstinate conduct." (Emphasis added.)

Similarly, in *Carillo v. Westbulk,* 514 F.2d 1214, 1220 (1st Cir. 1975), the Court asked:

> "[S]hould the plaintiff receive his counsel fee for the entire case, including those claims which the adverse party was not obstinate in resisting? We have indicated otherwise.

See *Pan American World Airways, Inc. v. Raymos,* 1 Cir., 1966, 357 F.2d 341, 342."

Finally, in *Signal Delivery Service, Inc. v. Highway Truck Drivers & Helpers, Local No. 107,* 68 FRD 318, 322 (D.C. Pa. 1975), counsel fees were awarded only in so far as such fees were incurred in one particular phase of litigation:

> "The Clerk of Court found that the defendants acted in bad faith, vexatiously, wantonly and for opressive reasons and on this basis concluded that the plaintiff was entitled to attorneys' fees. *We do not, however, concur* with this finding that the conduct of the defendants warrants *shifting to them the entire amount of attorneys' fees* incurred by the plaintiff in this litigation." (Emphasis added.)

Thus, even if Aaacon's conduct were obstructive, it would appear from the decisions of lower courts and the analogous language in 28 U.S. Code Sec. 1927 that only "excess" attorneys' fees necessitated by vexatious conduct should be awarded. This would avoid a punitive multiplication of attorneys' fees beyond the damage caused by the vexatious party. See *Roadway Express, Inc. v. Piper, supra,* slip opinion, p. 3, footnote 3.

Respondent herself acknowledges, p. 11 of the brief in opposition, that the attorneys' fees award *should* be limited to the "expanded unnecessary expense" which Aaacon's alleged actions caused. Attorneys' fees should not be awarded for the entire amount of the entire litigation as the District Court below did.

However, no limitation of attorneys fees was observed in the instant case and, as heretofore noted, the decision in *Roadway, supra,* leaves the matter unarticulated. Accordingly, it is appropriate for review by this Court at this time.

II

ERRORS IN FACT

Respondent errs in its suggestion that the Interstate Commerce Commission had rejected the tariff provision of Aaacon Auto Transport, Inc. authorizing arbitration, and its supposition that the use by Aaacon of the arbitration provision was done in contravention of such a tariff rejection. The facts are that an employee of the Commission had rejected the arbitration provision in 1971. However, the following year, 1972, the Commission *accepted* for filing the tariff provision authorizing arbitration. From that period of 1972 through 1976, the provision authorizing arbitration was part of Aaacon's bill of lading agreement and tariff lawfully on file with the Commission, having the effect and force of a federal statute. *Louisville & N.R. Co. v. Maxwell,* 237 U.S. 94. It was in effect when the cause of action herein arose and when Aaacon moved before the District Court for a stay of litigation pending arbitration in 1974.

Second, respondent errs in suggesting that at the time of the District Court's decision there was a uniform body of law rejecting the arbitration provision as unlawful. The facts are that the Third Circuit Court of Appeals in *Aaacon Auto Transport, Inc. v. Jacobson,* 475 F.2d 1394 (3rd Cir. 1973) had upheld and enforced the arbitration provision which was at issue in the District Court. It is currently the law in the Third Circuit.

Accordingly, there was no uniform body of law rejecting arbitration. Rather, there was a split in the Circuits. At the time of the motion and subsequent hearing the Fifth Circuit had not ruled the issue. Accordingly, pursuant to the code of Professional Responsibility DR7 106(b)(1) and EC 723 there was no controlling law nor was there any duty on the part of Aaacon's counsel to bring this split in the Circuits before the Fifth Circuit.

Third, petitioner had no duty to bring the issue of validity of the arbitration provision to the Court's attention because the matter was res judicata. The fact is that when the case was removed to the Federal District Court in 1974, Aaacon moved

for a stay of litigation pending arbitration. The District Court granted the stay, specifically finding:

> "It does not appear that there was a contract of adhesion or that there was anything unreasonable about this (arbitration) clause . . ." (Bracketed language added.) See Appendix 1 to this reply.

Respondent moved for reconsideration of the Court's stay pending arbitration and reconsideration was denied.

Miller then attempted to defeat jurisdiction by amending the complaint which the District Court also rejected. Thereafter, the parties were unable to agree on how to move the matter into arbitration. The Court sua sponte determined that the delay in arbitration was too long and vacated the stay placing the matter back in litigation. Aaacon appealed this vacatur and the Fifth Circuit Court of Appeals sustained Aaacon's appeal. It remanded the matter to the District Court to determine who was at fault for the delay.

Thus, the sole issue before the District Court upon remand was fault for delay. Yet the District Court in determining the fault for delay *also* found the arbitration provision unlawful based on *Aaacon Auto Transport, Inc. v. State Farm,* 537 F.2d 648 (2d Cir. 1976). It villified Aaacon's counsel for not bringing the *State Farm* decision to its attention. It ignored the fact that the validity of arbitration was the law of the case, having been earlier found by the District Court to be "lawful and proper." It ignored the fact that the only issue on remand was the question of who was at fault for delay. It also ignored Aaacon's contention that there was a split in the Circuits—the Third Circuit having found the provision lawful and enforceable.

The sole basis for a finding of "vexatious" conduct has been this alleged failure of Aaacon's counsel to cite the *State Farm (Romagnoli)* case, representing a split in the Circuits, on an issue not before the District Court at the time.

A fourth error in respondent's facts is the issue of Aaacon's motion before the Eastern District of New York for an order enforcing arbitration. Such a motion was proper. It was made *prior* to any rejection by the Florida District Court of arbitration. Further, the motion before the Eastern District of New York was made under a separate section of the Federal Arbitration Act, 9 U.S. Code Sec. 4. Section 4 of the Federal Arbitration Act is separate and distinct from Section 3 of the Act under which the order in the Florida Federal District Court had been heard. They are *not mutually exclusive. In Re Pahlberg,* 131 F.2d 968 (2d Cir. 1942). Further the Federal Arbitration Act is written so that motions under Section 4 *must* be made in the District in which arbitration is to be held—herein New York. *Continental Grain Co. v. Dant & Russel,* 118 F.2d 967 (9th Cir. 1941). Clearly no wrongful conduct from the separate motions is attributable to Aaacon.

Fifth, the recitation of facts by respondent omits the fact that respondent had sought claim in litigation for $100,000 in actual damages. The total award was 2½% of that—$2,500. Yet on top of that award, the District Court awarded $25,000 attorneys' fees. The District Court did not award attorneys' fees for merely a *part* of the case which it felt was due to Aaacon's alleged dilatory actions or bad faith. Rather, the District Court awarded attorneys' fees for the entire litigation.

In other words, the District Court opinion here under review awarded attorneys' fees for every part of the litigation. Yet the obstruction alleged was limited solely to the delay caused by the attempted enforcement of the arbitration provision. It is this limited delay for which attorneys' fees should have been awarded, if attorneys' fees are properly awardable at all. The argument by respondent, that arbitration limited Aaacon's liability and was, therefore "reprehensible" conduct justifying attorneys' fees, finds no rationale at law. Nor was it a basis of the decision by the District Court. In fact, the Congress of the United States recently amended the Interstate Commerce Act to specifically permit carriers to limit their liability completely. 49 U.S. Code Sec. 10730. Thus the conduct which respondent

would label "reprehensible" has now been authorized and encouraged by the Congress of the United States and, further encouraged by regulations published by the Interstate Commerce Commission, 49 CFR 1137.10 et seq.

Further, unlawful clauses in carriers' bills of lading have historically been rejected by this Court as a basis to award attorneys fees. *Atlantic Coastline v. Riverside Mills,* 219 U.S. 207 (1911).

III

THE RESPONDENT HAS NOT DEALT WITH THE ABSENCE OF AUTHORITY OF THE DISTRICT COURT TO AWARD ATTORNEYS' FEES

Aaacon has noted in its petition to the Court that Attorneys fees are not awardable under Section 8 of the Interstate Commerce Act because that Section does not apply to motor carriers—such as petitioner. *T.I.M.E. Inc. v. U.S.,* 359 U.S. 464 (1958). Moreover, cases involving claims for damage to goods transported by an interstate carrier, such as the instant case, have always rejected attorneys' fees. *T.I.M.E.—D.C., Inc. v. Southwestern Historical War Museum,* 528 S.W.2d 901 (Tex. Civ. App. 1975); *Sutherland v. Ringsby Truck Lines, Inc.,* 549 P.2d 784 (Colo. App. 1976); *Humphrey Feed & Grain v. Union Pacific R.R. Co.,* 257 N.W.2d 391 (S. Ct. Neb. 1977).

Further, respondent has not dealt with the fact that the statutory provision under which the litigation herein was brought in the District Court, 49 U.S. Code Sec. 20(11), now 49 U.S. Code Sec. 11707 provided an exclusive measure of damages is provided, no attorneys fees are awardable even under the Court's equitable power:

> "These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, *unless forbidden by Congress.*
>
> * * *

> "Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are *matters for Congress to determine.*
>
> * * *
>
> "*Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some but not others.* But it would be difficult indeed for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former." (Emphasis supplied.)

Alyeska Pipelines Service Co. v. Wilderness Society, Inc., 421 U.S. 240, 259, 262-264 (1975). Accord: *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U.S. 190 (1916); *Missouri Pacific v. Rouw Co.*, 258 F.2d 444 (5th Cir. 1958).

As stated in *Hall v. Cole*, 412 U.S. 1, 1973:

> "This does not end our inquiry [on attorneys' fees], however, for even where 'fee-shifting' would be appropriate *as a matter of equity, Congress has the power to circumscribe such relief* (emphasis and bracketed language added). Id. at 9."

Accord: *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719, 720 (1967). Accordingly, attorneys' fees are not awardable in the instant case because Congress has provided the exclusive measure of damages in enacting 49 U.S. Code Sec. 20(11).

For the foregoing reasons it is respectfully submitted that two important issues should be resolved by this Court at this time:

1. whether attorneys' fees are awardable where a statute provides the exclusive measure of damages; and

2. whether under the *Roadway* decision, attorneys' fees, if awardable, are limited to the excess attorneys' fees caused by

the vexatious conduct or, whether as the District Court below held, attorneys' fees should be awarded for the entire litigation when there is vexatious conduct on the part of the party.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit affirming the decision of the United States District Court for the Southern District of Florida.

Respectfully submitted,

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APPENDIX "1"
ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JUDITH A. MILLER,

Plaintiff,

vs.

AAACON AUTO TRANSPORT, INC.,

Defendant.

THIS CAUSE is before the court on defendant's motion to stay litigation pending arbitration. This case was originally filed in the circuit court of the seventeenth judicial circuit, Broward County, Florida, and was removed to this court pursuant to the terms of 28 U.S.C. §§1441 and 1445(b). Plaintiff's complaint alleges that her automobile was damaged while in the possession of defendant for purposes of transporting it from California to Florida. Prior to shipment, the parties entered into a bill of lading agreement, a copy of which has been supplied to the court. This agreement provides, in part, that "Any claim or controversy, whether founded in contract or tort, arising out of or relating to this agreement or performance or breach thereof shall be settled by arbitration in New York City."

The court is of the opinion that plaintiff's claim for damages to her car is covered by this arbitration clause. It does not appear that this was a contract or adhesion or that there was anything unconscionable about this clause which would prevent a court from giving effect to it. Since plaintiff has not filed a

response to defendant's petition to stay litigation pending arbitration, the court has no way of knowing whether plaintiff has any valid defenses to the enforcement of this contract. It is well settled, however, that arbitration clauses are to be liberally construed and all doubts resolved in their favor. *Scherk v. Alberto-Culver Co.*, 94 S.Ct. 2449 (1974). It is, therefore,

ORDERED AND ADJUDGED that trial of this action is stayed until arbitration has been had, providing defendant does not hereafter default in proceeding with such arbitration.

It is further ORDERED AND ADJUDGED that counsel for defendant shall advise the court in writing as to the status of arbitration six months from the date of this order.

DONE AND ORDERED this 10th day of September, 1974.

s/Norman C. Roetgen
United States District Court Judge

CC: MORGAN, CARRATT and O'CONNOR
Steven Fine, Esq.